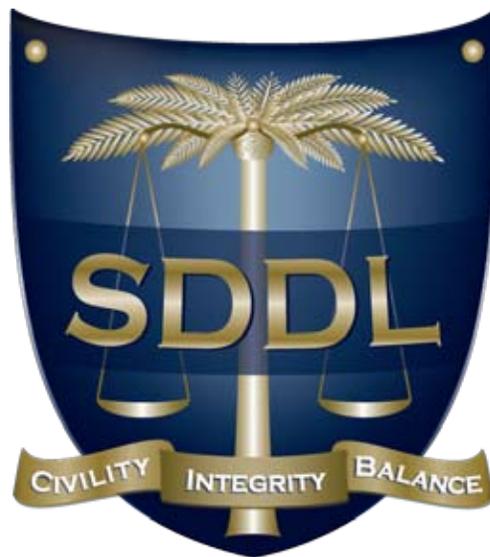


THE UPDATE



**SAN DIEGO
DEFENSE LAWYERS**

WINTER 2010

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Bottom line

Case Title: Ponani Sukumar v. Med-Fit Systems Inc.; Nautilus Group Inc.

Case Name / Number: SDSC Case No. GIC 852863

Judge: The Honorable Timothy B. Taylor

Plaintiff- Ponani Sukumar

Defendants – Med-Fit Systems Inc.; Nautilus Inc.

Length: Jury Trial, Six Days

Type: Limited Re-Trial after remand

Causes of Action: Breach of Contract, Negligent Misrepresentation, Inducement of Breach

Plaintiff's counsel: Eric Berg of Brownstein Hyatt Farber Schreck; G. Cresswell Templeton III, of Hill Farrer & Burrill; and James Friedhofer of the Law Offices of James Friedhofer (appellate and motion counsel)

Defendant's counsel: Robert W. Harrison and Patrick J. Kearns
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP

Type of Incident/Cause of Action:
Breach of Contract / Business Tort

Plaintiff's Demand: None

Defendant's Offer:
Med-Fit Systems: \$45,000 via section 998
Nautilus Inc.: \$15,000 via section 998

Verdict: Defense, all parties, all counts. (Breach of contract, negligent misrepresentation, inducing breach of contract.)

Trial Type: Jury

Deliberations: Approximately 4 hours.

Post-Judgment: Motion for New Trial, Motion for JNOV and Motion to Tax cost filed - all denied.

The Bottom Line

Case Title: Vandell v. State Farm

Case Number: 37-2008-00064024- CU -IC - EC

Judge: The Honorable Eddie Sturgeon

Plaintiff's Counsel: Rebecca Fortune
Lynn and Fortune

Defendant's Counsel: Elizabeth Skane, and Michelle Schill of Skane Wilcox LLP representing Integrity Restoration Inc.

Type of Incident/Causes of Action: This case involved a mixed bad faith, negligence/breach of contract case against State Farm and their preferred service provider, Integrity Restorations. Plaintiff, Dr. Vandell, a orthopedic doctor living in the Mt. Helix area of San Diego suffered property damage when a 100 ft tall, 100 year old tree was blown over during the winds of El Ninyo in 2005. The tree crushed a portion of Plaintiff's exterior deck and demolished his koi pond. State Farm, his homeowners insurance provider adjusted the loss and assigned their preferred service provider Integrity Restorations to repair the home, deck and koi pond. Plaintiff

Cont'd on pg. 4

PRESIDENT'S MESSAGE



The year of my presidency of SDDL is ending just as it started: Lots and lots of gusty, windy, rainy weather!! Never made that connection before, did you? Despite the gloomy weather, this past year's of events with SDDL has been anything but gloomy. As an organization, we had a great year. Our average attendance at the monthly Brown Bag lunches has been the highest that it has been in years. We attribute that to interesting and timely topics, and the great speakers that we lined up. Thanks to all the Brown Bag presenters for interesting and informative presentations. And, thanks to our "CLE Czar", Pat Mendes, who made everything go very smoothly (including pinch hitting for one speaker that didn't show up!).

Our Golf Tournament increased in size and scope. For the second year in a row we held it at The Crossings in Carlsbad. Although that may have been a bit of a drive, it was well worth it. Everyone loved the course. And, of course, the "usual suspects" won the tournament. But the real winner was Juvenile Diabetes, to whom we donated \$10,000 for research. Special thanks to Jim Wallace (our soon to be 2011 President) and his team for all the hard work.

In the fall, we had over 15 schools provide 20 teams for the SDDL Mock Trial, an increase of 4 teams from previous years. The winning team was Berkeley. The local teams did very well. Scott Schabacker and J.D. Turner co-chaired the event. Our membership did an excellent job of "stepping up" and volunteering as judges for the competition. Without the help of our judges, the event could not go forward. Our event is becoming very well known among law schools. This year, we had to turn down at least three schools. Hopefully we can continue to expand the event while maintaining our established high standards.

Victoria Stairs (our over-worked treasurer) helped to make not only the golf tournament a success, but also to make last year's and this year's Installation Dinner a success. For our upcoming dinner, we've added a Casino Night as an "after dinner" event. I look forward to seeing you there, and beating you in poker!

Finally, I know that it seems that The Update just sort of seems to appear out of nowhere, but, believe me, a lot of hard work goes into making each issue. For the high quality of this "magazine" we can thank Tracey VanSteenhouse, and her able assistant, Alan Greenberg.

In short, I was honored to serve as your president this past year and to be able to work with such great people on the Board of Directors. Thank you for your support and I hope that each of you will continue to support the efforts of next year's board and President.

THANKS!!!

**The San Diego
Defense Lawyers
would like to thank
US Legal Support
for the generous donations
made on behalf of SDDL
to the Juvenile Diabetes
Research Foundation and
the South Bay Community
Free Clinic.**

SAVE THE DATE & SEND IN YOUR RSVPs

SAN DIEGO DEFENSE LAWYERS

Annual Installation Dinner and Casino Night

Honoring: the SDDL Lawyer of the year

Kenneth J. Medel Esq. (The now Honorable Kenneth J. Medel)

Saturday January 29, 2011

Manchester Grand Hyatt

One Market Place, San Diego, CA 92101

The night begins at 5:00 p.m. with hosted bar followed by dinner at 6:00 p.m and casino at 9:00 p.m.

RSVP by January 17, 2011

Dianna Bedri (619) 238.2253

1010 Second Avenue, Suite 2500

San Diego, CA 92101

black tie optional

Immediately following the Installation Dinner this year is SDDL's Casino Night. We will be raffling off prizes including but not limited to:

- High Definition Flipcam (compact digital video recorder)
- Wi-fi Blu-ray Player
- Nook (e-book reader)
- 2 Portable RCA DVD players
- 2 Nikon Digital Cameras
- 2 Tom Tom GPS Navigation Systems
- Cuisinart Wine Refrigerator
- 2 Apple iPods
- Philips iPod Player/Docking Station
- Sony iPod Player/Docking Station
- 3 Digital Photo Frames
- Patron Gift Basket
- 2 Grey Goose Gift Basket
- 2 Bailey's Gift Basket
- 3 Wine Gift Baskets
- Perrier Jouet Gift Basket
- Moet Gift Basket

THANKS!!!

The San Diego Defense Lawyers would like to extend our gratitude to Thorsnes Litigation Services for all their generous contributions to our organization during the year including the Golf Tournament, the Mock Trial and providing delicious refreshments at the evening Brown Bag seminars.

Cont'd from pg. 2

entered into a contract with Intergriy later firing them and suing them for negligence and breach of contract. Plaintiff also sued State Farm for bad faith in the handling of their claim.

Settlement Demand: \$700,000

Settlement Offer: \$25,000

Trial Type: Jury

Trial Length: 7 weeks

Verdict: Defense as to Integrity. Verdict of \$20,000 as to State Farm.

The Bottom Line

Case Title: Rachal vs. Webster Insurance Agency

Case Number: 37 – 2008- 00084555 – CU – BC - CTL

Judge: The Honorable Steve Denton

Plaintiff's Counsel: Steve McKinley and Karen McKinley
Asaro, Freeland, and McKinley

Defendant's Counsel: Elizabeth Skane and Jenni Martinez of Skane Wilcox LLP representing Webster Insurance, and Peter Garchie and Ramin Hariri and Rueben Tarango of Lewis Brisbois, Bisgaard and Smith representing Pacific Southwest Associates (PSA)

Type of Incident/Causes of Action: Insurance Broker Liability case. Defendant Webster Insurance was sued for breach of oral contract, negligence, and constructive fraud by Plaintiff. Webster was also sued by PSA for breach of contract and express indemnity pursuant to a written contract between the parties. Plaintiff claims he asked Webster to obtain for him a policy of insurance as an owner/builder general contractor to protect him in his operations as the builder of single family custom homes. Webster did not have a market for general contractors and contacted PSA, another retail insurance broker acting as a wholesale broker in this matter to obtain the requested insurance. The policy issued was for a drywall subcontractor with residential exclusions. Plaintiff was sued for trespass and nuisance by his neighbors and tendered the loss to his insurer Colony Insurance Company. Colony denied coverage based on material misrepresentations in the applications for insurance and sued their insured for rescission of the policy. Colony settled this claim before trial for a total of \$85,000 paid to the Plaintiff. The case was tried in a bench trial before a jury trial to decide 1) if Colony had a right to rescind the policy of insurance and did in fact rescind 2) whether or not Colony had a duty to defend and indemnify their insured under the existing drywall policy in the underlying litigation. The court ruled that Colony did have a duty to defend and indemnify their insured in the underlying lawsuit and that Colony also later had a right to rescind the policy based on material misrepresentations. The court's ruling set up Plaintiff to claim attorneys fees in litigating the Colony action under the tort of another doctrine, and for attorneys fees and costs in defending the underlying litigation. Plaintiff asked the jury for

Cont'd on pg. 6

Appellate Update

Violation of Vexatious Litigant Prefiling Order Not “Cured” By Subsequent Retention of Counsel



By Lane Webb and Alan E. Greenberg
WOOD SMITH HENNING & BERMAN LLP

In *Kovacevic v. Avalon At Eagles' Crossing Homeowners Assoc.* (2010) 189 Cal. App. 4th 677 The Court of Appeal held in October 2010 that the trial court properly entered a judgment dismissing the plaintiff's action without prejudice because the plaintiff, who was a declared vexatious litigant, violated a 2002 prefiling order that precluded her from filing any new litigation in propria persona without first obtaining leave of court.

This case arose out of a complaint in December 2008 by Carmen Kovacevic, in propria persona, containing 11 causes of action against Avalon at Eagles' Crossing Homeowners Association (Avalon), various directors of Avalon, and the property management company that manages the condominium complex in which Kovacevic lives. Subsequent to the filing of the complaint, on May 19, 2009, an attorney substituted into the case as Kovacevic's counsel. Shortly after the substitution, on June 4, 2009, the defendants filed a notice pursuant to section 391.7(c) in which they requested that the court dismiss the case on the ground that Kovacevic was a vexatious litigant who, in the filing the action, violated a 2002 prefiling order that precluded her from filing any new litigation in propria persona without leave of court. The defendants argued that the clerk had mistakenly filed Kovacevic's complaint, and requested that the court dismiss the case pursuant to section 391.7(c).

On June 10, 2009 Kovacevic's counsel filed a first amended complaint containing four causes of action. On July 7, 2009, the trial court held a hearing on the defendant's request to dismiss the case. Kovacevic's attorney appeared at the hearing and argued that Kovacevic had “kind of corrected” the improper in propria persona filing by obtaining representation. The court responded, “I understand now she has an attorney...I don't think going out and getting an attorney after the fact saves the complaint.” At the conclusion of the hearing, the court dismissed the action without prejudice. On August 10, 2009, the trial court entered a judgment of dismissal, without prejudice, in favor of defendants. Kovacevic timely appealed.

Kovacevic acknowledged in her brief that the dismissal was proper under a “literal interpretation” of section 391.7(c), but maintained that the Court of Appeal should apply a “flexible, policy-oriented construction of vexatious litigant law,” and hold that Kovacevic “cured” the improper in propria persona filing through her subsequent retention of counsel. The Court noted in the opinion that Kovacevic's claim raised a question of statutory interpretation, which the Court would review de novo. *Bravo v. Ismaj* (2002) 99 Cal. App. 4th 211, 219.

The Court reviewed the history of California's vexatious litigant statutes, which were first enacted in 1963 as a means of moderating a vexatious litigant's tendency to engage in meritless litigation. Under sections 391 through 391.6, a defendant may stay pending litigation by moving to require a vexatious litigant to furnish security if the court determines “there is no a reasonable probability” the plaintiff will prevail. Failure to produce the ordered security results in dismissal of the litigation in favor of the defendants.

In 1990, the Legislature enacted section 391.7(c) to provide the courts with an additional means to counter misuse of the system by vexatious litigants. Section 391.7 “operates beyond the pending case” and authorizes a court to enter a “prefiling order” that prohibits a vexatious litigant from filing any new litigation in propria persona without first obtaining permission from the presiding judge. The presiding judge may also condition the filing of the litigation upon furnishing security as provided in section 391.3.

When a vexatious litigant violates the prefiling order requirement, section 391.7(c) provides, in pertinent part, as follows: “The filing of the notice [by defendant stating that the plaintiff is a

vexatious litigant subject to a prefiling order] shall automatically stay the litigation. The litigation shall be dismissed unless the plaintiff, within 10 days of the filing of that notice, obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b).” Kovacevic did not seek to obtain an order from the presiding judge permitting the filing of the litigation following defendants’ filing of a notice and request for dismissal.

The Court of Appeal agreed that under the plain language of the statute, the trial court properly dismissed the litigation pursuant to section 391.7(c). The Court noted that Kovacevic’s interpretation of section 391.7(c) would require the Court to read the statute as if the words “or obtains counsel” appeared in the text of the statute. The Court stated: “We may not insert words into a statute under the guise of interpretation [citation],” citing *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal. App. 4th 47, 65.

The Court of Appeal also considered and rejected plaintiff’s argument that *Forrest v. Department of Corporations* (2007) 150 Cal. App. 4th 183 supported her interpretation of section 391.7(c). In *Forrest*, a vexatious litigant was represented by counsel when the action was

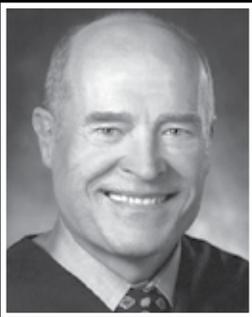
commenced but became unrepresented during the pendency of the lawsuit. The Court in *Forrest* held that section 391.7(c) should be broadly interpreted and that it applied throughout the pendency of the litigation. Therefore, since the vexatious litigant was in propria persona after the withdrawal of counsel her action was dismissed. (The issue of whether section 391.7 does, in fact, govern the entire prosecution of an action and not just the initiation of a lawsuit is pending before the California Supreme Court in *Shalant v. Girardi* (2010) 183 Cal. App. 4th 545, review granted July 21, 2010. The *Shalant* Court disagreed with *Forrest*.)

Kovacevic’s argument was that “if attorney loss causes [a] represented plaintiff to require the Presiding Judge’s approval [as in *Forrest*], an unrepresented plaintiff no longer requires court approval after obtaining an attorney.” The Court saw no basis for extending *Forrest* in that fashion. The Court noted that the *Forrest* court broadly interpreted section 391.7, subdivision (a) to affirm the dismissal of the vexatious litigant’s lawsuit and that in this case Kovacevic was trying to argue that the Court should narrowly interpret 391.7(c) so as to reverse the dismissal of a vexatious litigant’s lawsuit. Therefore, *Forrest* did not support Kovacevic’s interpretation of section 391.7(c)

Finally, the Court rejected Kovacevic’s argument on policy grounds that dismissal of her action was excessively punitive. The Court observed that dismissing a lawsuit that the vexatious litigant had no right to file in the first place is not excessively punitive. Rather, such a result was consistent with the statute’s purpose of countering misuse of the legal system by such litigants.

The decision by the Fourth District Court of Appeal is important because it clarifies that the Code of Civil Procedure §391.7(c) cannot be circumvented by vexatious litigants who violate a prefiling order by filing a lawsuit in propria persona without leave of court simply by retaining counsel at some point after the commencement of the new litigation. The Court rejected plaintiff’s call to narrowly interpret section 391.7(c) so as to reverse the dismissal of a vexatious litigant’s lawsuit. The Court reaffirmed the importance of section 391.7(c) as a tool in the hands of the trial courts to further the Legislature’s intention in the vexatious litigant statutes, Code of Civil Procedure §§391 through 391.7, of “counter[ing] misuse of the system by vexatious litigants.” *Bravo* at 221.

Welcoming



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(Ret.)

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- Known for his pleasant demeanor, excellent legal knowledge, impartiality, and settlement abilities
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Cont'd from pg. 4

about \$360,000 in economic loss, and an equal amount in emotional distress damages. The punitive damages phase of the trial was stayed pending a finding of fraud. Webster claimed that the contract between it and PSA was unenforceable because the contract was signed by an employee without the authority to sign on behalf of Webster and because Webster had no knowledge of the existence of the contract. PSA argued agency and ratification.

Settlement Demand: \$300,000 from the Plaintiff to Webster with no hold harmless agreement, \$1 million jointly to both defendants. No settlement demand from PSA to Webster.

Settlement Offer: \$200,000 to the Plaintiff from Webster combined with a hold harmless agreement.

Trial Type: Jury/Judge: Bench trial (one week) followed by Jury trial (three weeks)

Trial Length: one month

Verdict: Defense verdict as to cross complaint by PSA. As to Plaintiffs direct action against Webster the jury found no breach of fiduciary duty as to Webster. They found the breach of oral contract cause of action was barred by the statute of limitations. As to the negligence cause of action they awarded a total of \$280,000 with a 20% allocation to Webster which after offset for the Colony settlement should amount to about \$40,000 total. As to PSA they found negligence, and breach of fiduciary duty and gave PSA an 80% allocation of fault. PSA also defended the fraud cause of action. The jury found fraud, but did not find malice.

The Bottom Line

Case Title: Obdulia Sanchez vs. Elizabeth Zimmerman Scott, M.D.

Case Number:

37-2009-00099582-CU-MM-CTL

Judge: The Honorable Joan Lewis

Plaintiff's Counsel: Nikolaus Reed, Esq.
Law Offices of Andy Van Le & Associates

Defendant's Counsel: Clark Hudson, Esq.
Neil, Dymott, Frank, McFall & Trexler, APLC

Type of Incident/Causes of Action:
Negligence and Battery

Settlement Demand: \$300,000

Settlement Offer: Waiver of Costs

Trial Type: Medical Malpractice

Trial Length: 4 days

Verdict: Defense

Jury Finds for Defense in High Exposure Design Defect/Wrongful Death Case

By Alan E. Greenberg, Esq.



On July 21, 2010, the jury returned a defense verdict in an action entitled, *Estate of Richard Metcalfe II, et al. v. Yamaha Motor Co. Ltd., et al.*, involving a personal watercraft and the death of the plaintiffs decedent from massive head trauma. The plaintiffs sought economic damages of more than \$200 million, as well as punitive damages.

The case was initially tried in 2008 with a mistrial ordered after the jury deliberated for eight days. On the retrial, outgoing SDDL President Brian A. Rawers of Lewis Brisbois Bisgaard & Smith LLC, was co-defense counsel with

Richard A. Mueller of Thompson Coburn, LLP of St. Louis, Missouri. The lead plaintiffs' attorney was nationally-known plaintiffs' trial attorney Richard H. Friedman of Friedman, Rubin in Bremer-ton, Washington. (Both the initial trial and retrial were tried in the central division of the San Diego Superior Court.)

The case arose out an accident on August 17, 2002 in the Colorado River between California and Arizona near the city of Yuma, Arizona. Plaintiffs' decedent, Richard M. Metcalfe II, 45, was operating a Yamaha WaveRunner personal watercraft. He came out of a side channel and turned up river into the path of an Ultra boat. The Ultra boat collided with the WaveRunner and Metcalfe died at the scene.

At the time of Mr. Metcalfe's death, he was the sole owner of AMS, which was a field marketing organization for insurance companies that provided the annuities. At the time of the accident there were approximately 2,000 independent AMS agents nationwide. The plaintiffs claimed that Metcalfe had earned \$11 million in the 12 months before the accident and that during the year of his death Metcalfe would have earned \$18 million. Plaintiffs economist projected that Metcalfe would have earned more than \$200 million over his work life expectancy but for the accident.

Plaintiffs' counsel claimed that, upon seeing the jet boat, Metcalfe released the throttle, and then attempted to steer but could not avoid the collision. Plaintiffs' counsel argued that the WaveRunner was improperly designed because it lacked brakes or an off-throttle steering device that would allow it to be steered after release of the throttle.

The defense proposed that the WaveRunner's off-throttle steering was reasonably safe and that the plaintiffs' alternative designs, such as brakes and rudders, were likely to cause, not prevent, accident and injuries. Further, the defense contended that the accident was entirely Metcalfe's fault for violating the local boating rules.

Defense experts conducted a crash test of an exemplar personal watercraft and Ultra boat to demonstrate that the angle of impact being suggested by plaintiffs' accident reconstruction expert was inconsistent with damage found on Metcalfe's WaveRunner after the accident. The defense experts compared the maneuverability of the WaveRunner with similar personal watercraft.

The jury found for the defense on the issue of the alleged designed defect. The jury also found that Metcalfe was responsible for the accident. If the jury had found for the plaintiffs and accepted the economic "loss of financial support" damage computation from plaintiffs' forensic economist this could have been one of the largest wrongful death verdicts ever in California or anywhere in the country. With pain and suffering, emotional distress damages and punitive damages, the final plaintiffs' verdict could have approached a half billion dollars.

On September 10, 2010, the plaintiffs' motion for a new trial was denied and Yamaha was awarded certain costs. The parties then reached a settlement of the action.

Congratulations to Brian Rawers for one of the exceptional San Diego defense counsel achievements in 2010.

The Bench Welcomes One of SDDL's finest

By Tracey VanSteenhouse
Wilson Elser Moskowitz Edelman & Dicker

On October 27, 2010 Kenneth J. Medel (former SDDL member who also served on the SDDL Board of Directors) took the oath of judicial office administered by Judge Robert J. Trentacosta. The courtroom was overflowing with judges, defense lawyers, plaintiff lawyers and members of the community. Judge Medel gave a heartfelt speech acknowledging his mentors and accepted his new position with enthusiasm. Judge Medel's appointment by Governor Schwarzenegger filled a vacancy created by the retirement of Judge Michael B. Orfield.

The Honorable Judge Medel began his legal career as a prosecutor with the San Diego District Attorney's Office. As many of you know, prior to his appointment, Judge Medel had his own firm, The Medel Law Firm, where he practiced medical malpractice defense and represented physicians in Medical Board disciplinary hearings. Prior to that, Judge Medel and our current SDDL President, Brian Rawers, owned their own firm, Medel & Rawers. Judge Medel also practiced at Ault, Deuprey, Jones & Gorman. Judge Medel earned his Bachelor of Arts from the University of California, Irvine and his Juris Doctorate degree from the University of San Diego School of Law.

Judge Medel will be honored by SDDL as the 2010 Lawyer of the Year at the Annual Installation Dinner and Casino Night at the Manchester Grand Hyatt on January 29, 2011.



The courtroom was packed



The oath was administered by The Honorable Robert J. Trentacosta



Introducing Judge Kenneth J. Medel for the first time!



Judge Medel's wife, Debbie Medel donned his judicial robe

Addressing Non-Compete Agreements from an Employer's Perspective



By Dane J. Bitterlin, Esq.
Neil, Dymott, Frank, McFall & Trexler APLC

Employers operating in California should all be familiar with California Business & Professions Code Section 16600, which prohibits non-compete agreements as they are against public policy.

With the exception of non-compete agreements arising out of the sale of a business or dissolution

of a partnership, California courts are loathe to uphold provisions of an employment agreement that constitute a restraint on the pursuit of a lawful profession. However, compared with other jurisdictions, California law is generally the exception rather than the rule. With California continuing to act as a magnet for qualified employees from around the country, the application of Section 16600 to out-of-state non-compete agreements is an important consideration for any California employer looking to siphon talent from its out-of-state competitors.

First and foremost, California employers need to be familiar with potential employees contractual relationships with former employers. If a non-compete agreement exists, an employer should not assume Section 16600 will trump or that the prospective employee is in the clear. The analysis must go a step further, and depends largely on the choice-of-law state's application of the contractual choice-of-law provision in the employment agreement versus the deferential provisions of Restatement (Second) of Conflict of Law Section 187(2), which gives significant weight to the employee's contacts with California in determining whether to apply California law. In applying Section 187(2) to out-of-state non-compete agreements, California courts have invalidated these provisions in situations where a California employer has contracted with an employee to provide services in California, regardless of whether that employee lives in California or where that employee's services are not rendered exclusively within the state. (See *Application Group v. Hunter Group* (1998) 61 Cal. App. 4th 881.)

Needless to say, California courts have historically been quick to protect the fundamental public policy that is codified in Section 16600. However, the practice of California court's issuing injunctions prohibiting enforcement actions

in other states has been severely curtailed following

the California Supreme Court's ruling in *Advanced Bionics Corporation v. Medtronic, Inc.* (2002) 29 Cal.4th

697. While the Califor-

nia Supreme Court agreed in *Advanced Bionics* that California

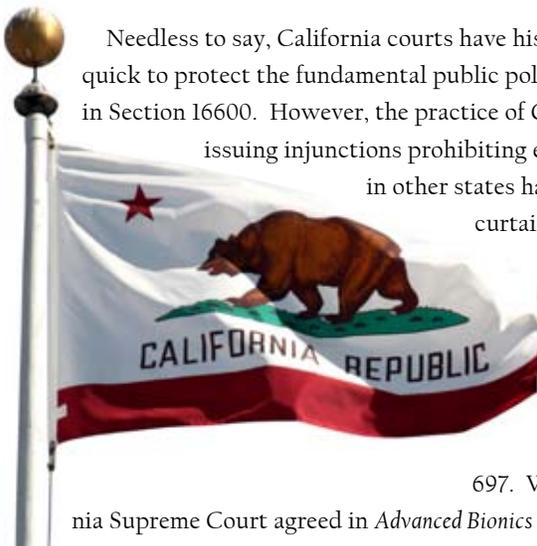
has a strong interest in protecting its employees from enforcement of non-compete agreements, the Court found that, based largely upon the principle of comity, this interest was not strong enough to permit issuance of injunctive relief to cut off court actions in other states. In light of this ruling, California employers need to be mindful of the very real danger of out-of-state enforcement actions filed in response to a California action. The first court to reach a judgment will likely determine whether or not a non-compete agreement will be enforced.

Of course, the mere fact a non-compete agreement may be enforceable against a prospective employee in California does not mean that employee is barred from taking employment with a California employer. In many states that allow non-compete agreements, the agreement itself must be reasonable in time and scope. If the prospective employee's non-compete agreement is without limitation as to geographic area, time, or in its definition of "competition," there is a chance the clause will not be enforced even in the foreign jurisdiction. California employers would be wise to have their counsel review the prospective employee's agreement through the lens of the foreign law to determine whether there is a founded cause for concern in the first place.

In this increasingly competitive job market, California employers must be mindful of the potential ramifications of out-of-state non-compete agreements. While the best defense against litigation is to avoid employees with contractual "baggage," it is often the brightest and most talented candidates who will have been pressured into entering such agreements by their former employers. California employers must carefully evaluate the risks and benefits of hiring such a candidate, and should in any event retain an experienced employment law attorney to guide them through the varied and complicated scenarios that may result from such a hiring decision.

THANKS!!!

SDDL appreciates the continued support from Peterson Reporting for providing a wonderful facility for our monthly Brown Bags.



California's Expedited Jury Trials Act: A Silver Bullet for Backlogged Courts and Costly Jury Trials?



By Matthew R. Souther, Esq.
Neil, Dymott, Frank, McFall & Trexler APLC

As civil litigants throughout California and the nation know very well, litigation is often time consuming and extremely expensive. New York and South Carolina have recently enacted expedited trial systems, which streamline the jury trial process and help ease the financial burden associated with civil trials. These expedited trial systems, which are elective,

provide an alternative middle ground between mediation and arbitration a lengthy jury trial. Both the plaintiff and defense bars agree these programs have enjoyed a good measure of success and have made the courts more readily accessible. In sum, the programs seem to have created a win-win situation for litigants.

California has decided to follow suit. On September 30, 2010, Governor Arnold Schwarzenegger signed into law the Expedited Jury Trials Act ("EJTA"). The EJTA provides California civil litigants with a faster and more economical alternative to traditional litigation.

The EJTA provides litigants with the option of conducting expedited one (1) day jury trials in civil cases. A key feature of the expedited trial system is completely optional participation, which is done by stipulation rather than court order. However, the litigants can withdraw from the expedited jury trial process, should both parties stipulate or the court determines *sua sponte* or upon noticed motion by a party that good cause exists.

The EJTA has implemented several case handling procedures that will also help expedite trials. In order to secure a verdict, a vote of 6 of the 8 jurors is required. There is a limit of 3 peremptory challenges for each side.

The EJTA provides for a jury of 8 or fewer members, with no alternates. The EJTA also imposes a 3 hour limit on each side to present its entire case. There are, however, no time constraints imposed upon jury deliberations. The EJTA will also somewhat relax the rules of evidence to facilitate a swifter trial; however, privilege and confidentiality doctrines will not be affected. Litigants cannot move for a directed verdict, file motions to set aside the verdict or any judgment rendered by the jury, or file motions for a new trial on the basis of inadequate or excessive damages. The only approved post-trial motions are motions relating to attorney's fees, motions to correct a judgment for a clerical error, and motions to enforce a judgment.

If the parties agree to an expedited trial, the verdict is binding and all rights to appeal are waived. However, there are only three instances in which a verdict may be disregarded: (1) judicial misconduct, (2) jury misconduct, or (3) "corruption, fraud or other undue means employed in the proceedings of the court, jury, or adverse party that prevented a party from having a fair trial."

In cases involving either minors or *in pro per* parties, the Court shall approve any high/low agreement; however, neither the existence of the high/low agreement nor its terms may be disclosed to the jury.

The EJTA also requires the Judicial Council to formalize additional rules and procedures on or before January 1, 2011. The EJTA program is scheduled to operate until January 1, 2016 but may be extended, provided such legislation is enacted before the expiration of the program.

Will the EJTA program ease California's overburdened civil court system and provide needed relief from the expotentially increasing costs of civil litigation? It seems to be easing some pain in New York and South Carolina. Why not California? Time will tell.



VALUATION AND FINANCIAL CONSULTANTS

AS OF NOVEMBER 1, 2010, WE WELCOME

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AS A PRINCIPAL IN THE FIRM.

The 20th Annual SDDL Mock Trial was a Grand Success

Scott D. Schabacker, Esq.
Law Offices of Scott Schabaker
SDDL 20th Annual Mock Trial Co-Chair

The SDDL 20th Annual Mock Trial was held on October 14 through 16 at the Central Courthouse in downtown San Diego and USD School of Law. Twenty law school mock trial teams from approximately a dozen schools entered the competition. There were teams from many of the best law schools in California, Texas, Washington DC, Pennsylvania and New York. Eighty aspiring civil litigators put on many fine presentations in the course of 20 trials conducted at the courthouse in the preliminary rounds on Thursday and Friday. 60 volunteer lawyers acted as 3-judge panels during the preliminary trials.

This year's case involved a dispute arising out of a child who was killed when he "darted out" onto a road by a campground and park. There were allegations by plaintiffs of inattentive and possibly alcohol-impaired driving by the defendant driver. Defendant claimed negligent supervision by plaintiffs, who entrusted the child to the care of a teenage sibling who became engrossed in a pick up ball game and completely lost track of the child. Unfortunately the child ran across the highway into the defendant's path and was injured. There were special problems involving expert qualifications, as the defendant had to rely upon the questionable expertise of a relatively untrained police officer, while the plaintiffs had a much more experienced professional retained expert. Both sides also had percipient witnesses and a large case file with depositions transcripts, a police report, numerous scene photographs and various documentary evidence, diagrams, and writings.

The students were very well prepared and made convincing and, in many cases, quite realistic opening statements, witness presentations with direct and cross-examination and closings. The teams were kept to strict time schedules and were scored by each of the volunteer judges. Several trials were decided by just one or two points. Many trials resulted in split decisions, with two judges finding for the winning team. The results of the initial rounds were announced on Friday night at a very festive reception for all of the



Berkeley Law School - first place (from left to right) Bruce Budner (coach), Suzanne Jaffe, Keydon Levy, Hon. Herbert Hoffman (Ret.), Inna Buschell and Joe Goldstein-Breyer.

students, their team coaches and the volunteers at the U.S. Grant Hotel.

In the end, all three San Diego law schools (USD, Thomas Jefferson and California Western) were able to send teams to the semi-finals. They were joined by the team from Berkeley, which won the trophy last year. The success of the local schools this year contrasts with the outcome in 2009, when the four semi-finalists were McGeorge, Brooklyn, Richmond, and Berkeley. This year's semi-finalists earned their top spots. All four teams were undefeated (they won both of their preliminary trials.) To reach the semi-finals this year, they also had to convince all six of the judges they encountered that their teams made the best use of the available evidence and the applicable legal authority. Although the judges did not score the witnesses, some of the student-witnesses were as believable as any professional actor. The winning teams knew the case involving more than 100 pages of case material inside and out. They had professionally prepared exhibits and were very well mentored by the assigned lawyer-coaches provided by their schools.

The two semi-final trials and the championship trial were all conducted on Saturday, October 16th at USD. Tom Sharkey, who was in USD's first law school graduating class, came home to preside in the trial between USD and California Western. Unfortunately for Mr. Sharkey, his alma mater fell to California Western in a very close, hard fought battle that came down to the final argument. Judge Robert Dahlquist of the Superior Court in Vista was the presiding judge for the contest between Berkeley and Thomas Jefferson. This was another close and fascinating trial in which Berkeley, acting as counsel for the plaintiffs, edged Thomas Jefferson, which defended the driver. In the end, two very strong and very skilled teams from California Western and Berkeley appeared for the championship trial before the Honorable Herbert Hoffman (Retired) with two other judges. This time, Berkeley was assigned to the defense, and California Western was counsel on behalf of the plaintiffs. The score was extremely close throughout. Either team could have won. Ultimately, Berkeley won because it presented a consummate defense. The



California Western School of Law (second place) Front Row—Left to right—Angela Shimizu, Vanessa Gerard Back Row Left to right—Solomon Chang (coach), A.J. Yarmolinetz, Adam Doyle, Matt Binninger (coach)



Berkeley Law School's first place team (from left to right) Joe Goldstein-Breyer, Inna Buschell, Bruce Budner (coach) Keydon Levy and Suzanne Jaffe,

Berkeley team refrained from overplaying the expertise of the police officer witness and used irrefutable logic supported by time and distance analysis to show that there was probably nothing the driver could have done to avoid the accident, given the circumstances created by the child's sudden decision to run out onto the road. Many of those present were persuaded by Berkeley's argument that the driver's cell phone use was merely a red herring that did not contribute to the accident. On the evidence and argument presented, the final would have been a defense verdict in many real courtrooms. As things turned out, it was a split decision, with two judges scoring in favor of Berkeley and the third finding for California Western. All three judges scored the trial as nearly even. The slightest miscue by Berkeley would have given the trophy to California Western, and the "plaintiffs" would have recovered a very large judgment

SDDL would like to give special thanks to the many volunteer judges and lawyers who made this year's event such a success. Every participant had an enjoyable and enriching experience. There were nearly 70 volunteers who served as judges and a dozen or so more who stood by as alternates ready to serve if needed. SDDL extends its gratitude to Thorsnes Litigation Services for sponsoring the Mock Trial and for providing the dinners for the volunteer judges each night. SDDL also thanks the University of San Diego for allowing us to use its wonderful law school and appellate courtroom for the final three trials. Of course SDDL thanks the 80 dedicated law students who absolutely floored the judges with a level of skill, polish and professionalism that should be more than enough to make their schools extremely proud. SDDL looks forward to hosting another fine national level trial competition in 2011.

★ Member News ★

Best Lawyers, the oldest and most respected peer-review publication in the legal profession, named Sheila S. Trexler as the “San Diego Best Lawyers Professional Malpractice Lawyer of the Year” for 2011.



Sheila S. Trexler

On October 21, 2010, after more than a quarter of a century in publication, *Best Lawyers* designated “Lawyers of the Year” in high-profile legal specialties in large legal communities. Only a single lawyer in each specialty in each community was honored as the “Lawyer of the Year.”

Neil Dymott shareholder, Sheila S. Trexler, was named “San Diego *Best Lawyers* Professional Mal-

practice Lawyer of the Year” for 2011.

The lawyers honored as “Lawyers of the Year” received particularly high ratings in the *Best Lawyers* surveys by earning a high level of respect among their peers for their abilities, professionalism, and integrity.

Best Lawyers compiles its lists of outstanding attorneys by conducting exhaustive peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers. The current 17th edition of *The Best Lawyers in America*

(2011) is based on more than 3.1 million detailed evaluations of lawyers by other lawyers.

Sheila Trexler has been a shareholder at Neil, Dymott, Frank, McFall & Trexler APLC since 1993 and director since 2004. Ms. Trexler has been named one of the “Top 50 Women Litigators in California” by the *Los Angeles Daily Journal* and was recognized as the “San Diego Defense Lawyer of the Year” by the San Diego Defense Lawyers Association in 2009. In addition, Ms. Trexler is honored to be an associate member of the prestigious American Board of Trial Advocates.

U.S. News & World Report and Best Lawyers Release 2010 Best Law Firms Rankings

On September 15, 2010, U.S. News Media Group and *Best Lawyers* have released the 2010 Best Law Firms rankings, marking the inaugural publication of this highly-anticipated annual analysis. The rankings, including 30,322 rankings of 8,782 law firms in 81 practice areas, are posted online at www.usnews.com/bestlawfirms.

The following SDDL San Diego firms received “Tier One” rankings:

Higgs, Fletcher & Mack LLP - Alternative Dispute Resolution, Medical Malpractice Law and Personal Injury Litigation Defense and Tax Law

Neil, Dymott, Frank, McFall & Trexler APLC - Medical Malpractice and

Personal Injury Defense.

Seltzer Kaplan McMahon Vitek LC - Criminal Defense: White-Collar Family Law

White Oliver Amundson & Gallagher - Personal Injury Litigation - Defendants

Wilson Elser Moskowitz Edelman & Dicker LLP - Professional Malpractice Law Defense

Wingert, Grebing, Brubaker & Goodwin LLP - Personal Injury Litigation - Plaintiffs and Defendants

Visual Evidence Archive: Demonstratives That Made a Difference

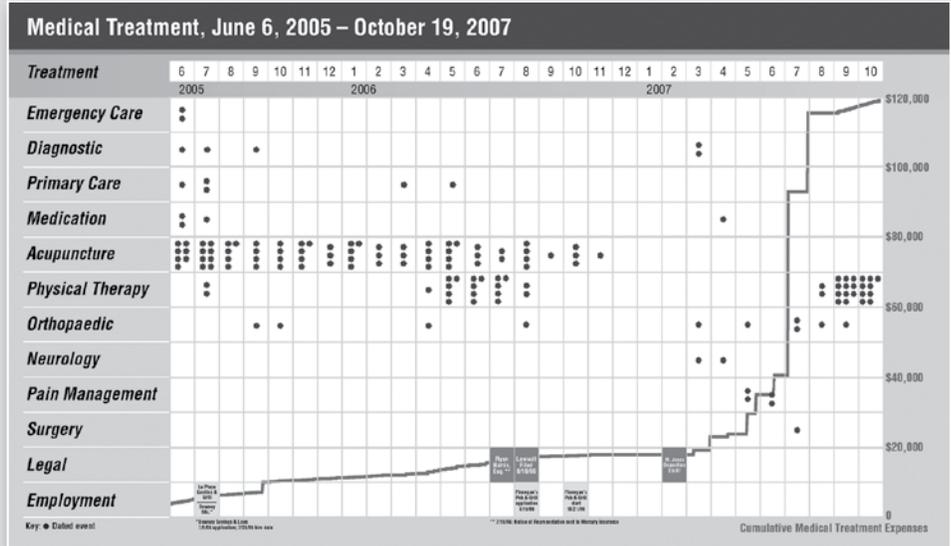
Practice Area: Personal Injury

Background: After a minor traffic accident, plaintiff sought medical treatment over the course of the next year with costs that plateaued at less than \$20,000. About a year later she hired counsel, and within a few months her medical treatment costs skyrocketed 500% higher.

A Demonstrative That Made a Difference:

By overlaying plaintiff’s treatment chronology on a graph displaying her cumulative medical costs, the defense was able to persuasively demonstrate that the litigation drove up medical costs. Specifically, this graphic shows that Plaintiff’s medical condition and her treatments had stabilized for a considerable period until her counsel referred her to his cadre of regularly used specialists.

Outcome: Liability was admitted, jury verdict for damages.



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(Some of the above firms also had tier two rankings in various areas. Please visit the website for further information.)

“U.S. News is the world’s leading publisher of institutional rankings based on both objective data and peer evaluations,” says Steven Naifeh, President of Best Lawyers. “We are combining this expertise with Best Lawyers’ experience of providing rankings of individual lawyers based on peer reviews for almost three decades. By combining hard data with peer reviews, and client assessments, we believe that we are providing users with the most thorough, accurate, and helpful rankings of law firms ever developed.”

These reputational survey responses were combined with more than 3.1

million evaluations of individual lawyers in these firms in the most recent Best Lawyers survey of leading lawyers. Hard numbers were also used to develop the practice area rankings — data about numbers of lawyers and their previous experience, numbers of clients within different billing ranges, numbers of transactions and litigation matters at different dollar levels; pro bono commitment, diversity, and other objective data.

According to *U.S. News & World Report*, “Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise.”

Law clerk, Rebecca M. Soule, passed the bar and has joined Wood Smith Henning & Berman LLC as an associate



Ms. Soule was sworn in by The Honorable Luis R. Vargas

Summer Bash



Cruisin' - The Honorable Kenneth J. Medel and Kenneth Greenfield's (past president of SDDL) infamous ride (the famous "Hundred and ten in Gila Bend" ride) to Tucson on their Harleys this past July.

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★ Member News ★

Neil Dymott Shareholder Clark Hudson Inducted into the American College of Trial Lawyers



Clark R. Hudson

On September 26, 2010, Neil Dymott shareholder Clark R. Hudson was inducted into the American College of Trial Lawyers (ACTL) at its 2010 Annual Meeting in Washington D.C.

Founded in 1950, the College is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is limited to the top one percent of the total lawyer population of any state or province. Fellowship status is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years trial experience before they may be considered for Fellowship.

Membership in the College cannot exceed one percent of the total lawyer population of any state or province. There are currently approximately 5,790 members in the United States and Canada, including active Fellows, Emeritus Fellows, Judicial Fellows (those who ascended to the bench after their induction) and Honorary Fellows.

Mr. Hudson has been a shareholder at Neil, Dymott, Frank, McFall & Trexler APLC since 1990. Mr. Hudson is a former board member and Past President for the San Diego Defense Lawyers and is the current Section Chair for Trial Tactics for the Federation of Defense and Corporate Counsel (FDCC). Mr. Hudson is also on the Board of Directors of the Association of Southern California Defense Counsel and is an associate member of the prestigious American Board of Trial Advocates.

Mr. Hudson has been named one of Southern California's "San Diego Super Lawyers" by the publishers of Law & Politics Magazine since 2007. He has also been selected by his peers for inclusion in the Best Lawyers of America® in Medical Malpractice Law since 2009.

Schwartz Semerdjian Ballard & Cauley Announces New Firm Name and New Partner



Sarah Brite Evans

Schwartz Semerdjian Ballard & Cauley LLP, announced its new firm name on November 1, 2010. The firm is also proud to announce the selection of Sarah Brite Evans for partner. Evans will become a partner effective January 1, 2011.

Evans represents individuals and corporations in lawsuits involving primarily business torts, contract disputes, and employment-related claims, including class actions. She is co-author of the employment law chapter of the American Bar Association's recent book entitled "A Practitioner's Guide to Class Action." She

has served on the board of directors of the Lawyers Club of San Diego and Affordable Housing Advocates. In 2007, Evans was named to the San Diego Daily Transcript's list of Top Young Attorneys and to the San Diego Metropolitan Magazine's Top 40 Under 40 list of young leaders in 2008. Evans graduated from the University of Southern California and Notre Dame Law School.

"We are excited to have Sarah join our partnership - she is an outstanding attorney and believes in the same work ethic and superior client representation that we all embrace here at the firm." said Dick Semerdjian.

SDDL Board 2010



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Back Row (L to R): Ben Howard, Alan Greenberg, Dennis O'Neill, J.D. Turner, Matt Souther, Scott Schabacker, Pat Mendes (CLE Coordinator)

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Membership Information:

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are \$145/year. The dues year runs from January to December 31, 2010. Applications can be downloaded at: www.sddl.org

THE UPDATE is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers.

All views, opinions, statements and conclusions expressed in this magazine are those of the authors and do not necessarily reflect the opinion and/or policy of San Diego Defense Lawyers and its leadership.

We welcome the submission of articles by our members on topics of general interest to our membership. Please submit material to:

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